IN THE

# Supreme Court of the United States

**OCTOBER TERM—1945**

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AGWILINES, INC.,

Petitioner,

against

M/S SAN VERONICO, her engines, etc., EAGLE OIL & SHIPPING CO., LTD.,

Respondent.

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## BRIEF IN SUPPORT OF PETITION

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

In *Propeller Monticello* v. *Mollison,* 17 How. 152, 155, an admiralty case, this Court said:

> "The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done."

The same principle was recognized and applied in *The Cayuga,* 14 Wall. 270, where the Court sustained the allowance in an admiralty cause for the value of the use of a ferryboat damaged in collision and held that the tort feasor could not take advantage of the fact that the owner used another ferryboat which was kept for emergencies and used while the injured vessel was being repaired.

The Court approved the "explanations" of the Circuit Court which said, 5 Fed. Cas. page 329, 331 (case No. 2,537):

> "It is quite obvious, that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay made by the libellants to enable them to serve the public and run their ferry without interruption; and yet that is the effect of yielding to the argument that, because such spare boat was already in the libellants' possession, and was used, therefore the libellants sustained no pecuniary loss by the delay."

To the same effect is the *Favorita,* 18 Wall. 598, 603. The Court in *Marshall Field & Co.* v. *Board,* 318 U. S. 253, affirmed in a *per curiam* opinion, *National Labor Relations Board* v. *Marshall Field & Co.,* 129 Fed. (2) 169, 172 (C. C. A. 7), where it was said:

> "The wrongdoer may not be benefitted by collateral payments made to the person he has wronged."

The majority opinion below did not discuss these decisions but felt precluded from awarding to libelant its full damages by this Court's decision in *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U. S. 303 (1927). (The commissioner considered this decision as only a related one but not in point.) (R. 39) We do not consider the *Robins* case controlling, but any question concerning it should be clarified by this Court.

2. If, as we contend, the foregoing decisions do not determine the question, there remains this important question of Federal law which has not been, but should be, settled by this Court, particularly in view of the doubts expressed below as to the scope of this Court's decision in the *Robins* case.

The principal question raised by the Circuit Court of Appeals is whether recovery by petitioner of its full damages is barred by the *Robins* case. The majority of the Circuit Court of Appeals considered that it was. Circuit Judge Clark definitely thought otherwise. The majority and minority opinions quoted, in support of their divergent views, different passages from the opinion of this Court by Justice Holmes in that case.

Petitioner submits that the *Robins* case did not decide the question here raised. There, the *SS Bjorneford* had been damaged while under repair in the Robins Dry Dock, through the negligent dropping of her propeller and time was lost while a new one was being installed. The *Bjorneford* was under a time charter to Flint & Co. Her owner claimed against the dry dock company for its damages, was paid and executed a release. Flint & Co., charterers, who had been relieved from payment of charter hire during the period of delay, brought this independent action to recover their loss, since during the war period (1917) charter rates had risen and the charter hire did not properly measure the value of the ship's use. This Court held that the charterers had no cause of action against the dry dock company. They were not parties to the contract for the repair of the ship, and had no standing to sue. As the Circuit Court of Appeals in the case at bar interpreted the decision, "Interference by a third person with the performance of a contract was an actionable wrong only if it was intentional". The *ratio decidendi* further appears from the reference by Justice Holmes as "a good statement, applicable here", to *Elliott Steam Tug Company, Ltd.* v. *The Shipping Controller* (1922), 1 K. B. 127, 138, 143, where the Court said:

> "In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel."

The *Robins* case was brought as "a case of contract and damage" (275 U. S. at page 307).

The majority of the Circuit Court of Appeals in the case at bar concluded its discussion of the *Robins* case with the following comment:

> "The Court thought it irrelevant that this resulted in exonerating the drydocker from nearly all liability through the fortuity that the profitable use of the ship had been divided between the owner and charterer: the difficulty went deeper; the drydocker had committed no legal wrong against the charterer at all, though he had caused it serious damage.
>
> Perhaps it was not necessary after so holding to consider our argument that the owner might be treated as suing on behalf of the charterer; but the Court did so and definitely repudiated it, as appears by the passage from the opinion on page 309, which we quote in the margin.* In the face of this decision we cannot see how we can do otherwise than affirm the decree at bar; if any change is to be made the Supreme Court must make it."

The dissenting opinion of Circuit Judge Clark reads the *Robins* opinion differently and after pointing out that the action there was by the charterers and that the owner of the vessel had already settled with the tort feasor, takes the view that the owner of the *Bjorneford,* except for hav-

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* "The whole notion of such a recovery is based on the supposed analogy of bailees who if allowed to recover the whole are chargeable over, on what has been thought to be a misunderstanding of the old law that the bailees alone could sue for a conversion and were answerable over for the chattel to their bailor. Whether this view be historically correct or not, there is no analogy to the present case when the owner recovers upon a contract for damage and delay."

ing settled with the tort feasor, could have sued for his full damages, and quoted the following from this Court's opinion in support:

> "The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents."

The majority opinion also cites *Chargeurs Reunis, etc.* v. *English & American Shipping Co.*, 9 Lloyd's List L. R. 464.

In this case, which, as the dissenting opinion below points out, is not reported officially, not only was there no discussion of the general principle of damages on which petitioner here relies, nor any thorough discussion of the issues, but factually the case is quite similar to the *Robins* case in that as the judges observed, the owner of the chartered vessel had been allowed his full damages and an attempt was then made to recover the charterer's losses as the subject matter of a distinct claim. The case does not deal with the question presented here whether the wronged person can have his ordinarily allowable damages reduced for the benefit of the wrongdoer by reference to collateral matters.

The dissenting opinion below also clearly points out (R., p. 73) that the *Robins* decision might well be supported on the further ground that to have permitted additional suit by the charterer would have resulted in subjecting the wrongdoer to multiplicity of actions, a difficulty no longer existing under modern principles of joinder where all interested parties can be brought in. As Judge Clark said:

> "The objection to any other course is that it puts difficulties in the way of funneling the money to the

> parties ultimately entitled thereto, all for the mere procedural advantage of a defendant who should be interested only in his own protection, not in the destination of the money."

If the majority opinion is to prevail, it amounts to applying to an admiralty case, a rule of damages different from that prevailing in common law actions, although admiralty damages are part of the general law on the subject and governed by the principles of common law actions.

In *The Cayuga,* 14 Wall., this Court said at page 278:

> "* * * it is settled law that the damages which the owner of the injured vessel is entitled to recover in cases of collision are to be estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immedidate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expenses incurred in making repairs, and unavoidable detention."

In the *Argentino,* 14 Appeal Cases (House of Lords) 519, a collision suit involving claim for detention damages, Lord Herschell said:

> "It is admitted that there is no special rule of the Admiralty Court governing the question, and that the law there administered in relation to such a matter is the same as prevails at common law."

And Lord Fitzgerald further observed:

> "It is to be regarded in the light of a common law action brought by the owners of the *Argentino* against the vessel in collision."

See also *Roscoe, Damages in Maritime Collisions,* Third Ed., p. 1, and *The Law Times,* Volume 159, page 301, also *31 Michigan Law Review,* page 978.

In this connection both opinions below (R., pp. 68, 74-5) adopted as a correct statement of the law, Restatement, Torts, Section 920 (e):

> "The Plaintiff is not barred from recovery merely because he suffers no net loss from the injury, as where he is insured or where friends make contributions to him because of the loss. If his things are tortiously destroyed, the insurance carrier is subrogated to his position. In other cases the damages which he is entitled to recover are not diminished by the fact that either as a matter of contract right or because of gifts, the transaction results in no loss to him."

The decision below did not apply this doctrine. The attempted distinction is unsound. It was the ruling of the Court that this petitioner, as owner of the *Agwidale,* had no claim for damages for the loss of her use, because by the charter agreement, petitioner had parted with the use to the United States. This, however, is in definite conflict with the statement of principles *supra* which the Court recognized as correct. The ruling infringes upon that principle because it takes into consideration for the benefit of the wrongdoer, a contract between petitioner and a third party with which he is not concerned. To insist that in the circumstances, petitioner suffered no "pecuniary loss" is, as the dissenting opinion points out, "mere question begging" (R., p. 75). The question is, whether the wrongdoer may invoke reference to the contract at all in determining that question.

3. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeal on the application of this fundamental principle of damages.

The majority opinion below cited some of these cases and accepted their doctrine, but, as we suggest, did not apply it. It has been applied in other Circuits to a variety of situations as pointed out in the full discussion of the law in the dissenting opinion. Thus for example in *S. H. Kress Co.* v. *Bullock Shoe Co.*, 56 Fed. (2) 719 (C. C. A. 5), it was held that an owner's right to damages for injury to his buildings was not affected by the fact that under the terms of his lease the tenant was required to continue payments. The doctrine has been applied not only to instances of compensation received from an insurance company, but to those received under a state compensation act. *National Labor Relations Board* v. *Marshall Field & Co.*, 318 U. S. 253. See also *Overland Contract Co.* v. *Sydnor*, 70 Fed. (2) 338 (C. C. A. 6). Indeed the Circuit Court of Appeals for the Second Circuit applied it to payments under the Railroad Retirement Act, *McCarthy* v. *Palmer*, 113 Fed. (2) 721; certiorari denied, *Palmer* v. *McCarthy*, 311 U. S. 680.

The majority opinion also disregarded its own specific holding, as the dissenting opinion observes (R., p. 76) in *Pool Shipping Co.* v. *U. S.*, 33 Fed. (2) 275, where in reliance upon the same principle, the Court held that in a collision suit filed by the owner of a vessel, payments in general average made to it by the owner of cargo could not be used *pro tanto* by the wrongdoer in reduction of his damages.

4. The authoritative decision of the question is of great importance to the admiralty bar and to the shipping industry, and will determine controversies in many other cases involving large sums. An affidavit filed on behalf of petitioner in support of earlier argument in the Circuit

Court of Appeals asserted without contradiction from respondent that the amount involved in cases presenting the same question is in excess of $1,000,000. The United States, whose interest in the controversy is apparent, operated hundreds of vessels during the war for over two years under similar charters as to which the same question has arisen and will arise.

The practical result of the decision below gives the wrongdoer an undeserved windfall. If he may properly contend that the owner of a vessel, which is completely on-hire in such circumstances, has suffered no damage, the net result is that the charterer has lost complete use of the vessel for which he has paid and the wrongdoer, through benefit from a contract with which he is not concerned, entirely escapes responsibility for the damage done.

## CONCLUSION

**The question raised by this application should be definitely settled by this Court.**

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of this Honorable Court, to the Circuit Court of Appeals for the Second Circuit, to review said cause.

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